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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 56

AMERICAN FEDERATION OF LABOR,
JOHN FITZPATRICK,
CHICAGO FEDERATION OF LABOR, ET. AL.,
Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN,
NAN CHAPMAN, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

MYER N. ROSENGARD,
SAMUEL A. RINELLA,
Counsel for Respondents.

EUGENE W. SCHOFLER,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 929

AMERICAN FEDERATION OF LABOR,
JOHN FITZPATRICK,
CHICAGO FEDERATION OF LABOR, ET. AL.,
Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN,
NAN CHAPMAN, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

JURISDICTION.

Petitioners invoke the jurisdiction of this Court under Section 237 (b) of the Judicial Code (U. S. Code, Title 28, Section 344). The last order was entered in the Supreme Court of Illinois on April 3, 1940 (sustaining defendants in error (respondents) motion to dismiss the writ of error.

Respondents moved to dismiss the writ of error because it was asserted that all of the questions involved were disposed of and determined on a previous appeal in the same case and between the same parties (Rec. p. 34). The opinion of the Supreme Court of Illinois on the first appeal is officially reported in 372 Ill. 91.

Questions Presented.

We shall hereinafter refer to the parties as follows: To petitioners as "Defendants"; to the respondents as "Plaintiffs." Italics are supplied unless otherwise noted.

The defendants by their petition seek a modification of a final decree enjoining and restraining them from picketing and patrolling in front of or near plaintiffs' place of business and from carrying and exhibiting placards, banners and signs containing legends which the complaint charged and the decree declared were untrue statements of fact; and from inducing or influencing persons not to enter employer plaintiffs' place of business, either to seek employment or to conduct business relationships with him (Rec. p. 37). This decree also enjoins and restrains so-called violent and intimidating conduct of the defendants. Such conduct appears to have taken place and it is so charged in the complaint; the defendants are also charged with fostering, aiding and abetting a secondary boycott (Rec. p. 37). Defendants do not seek a reversal of that part of the injunctional order enjoining and restraining violence and intimidation. Defendants contend in their petition for writ of certiorari that the injunctional order insofar as it restrains picketing, patrolling and the exhibition of signs, placards, etc., in the picket line, even though such signs may contain presently false legends, is a denial of freedom of speech as guaranteed by the Fourteenth Amend-

ment to the Constitution of the United States. Defendants challenge the decree, contending that the restraint of so-called peaceful activities deprived the individual defendants of privileges and immunities guaranteed to citizens of the United States; and also that they were denied due process of law, in that the liberty of freedom of speech was denied to them by that part of the decree herein referred to.

We submit that they are not entitled to review under the privileges and immunities section of the Fourteenth Amendment. This record does not contain any evidence, nor can any reasonable inference be drawn from the record, that the individual defendants are citizens of the United States. Neither the plaintiffs' complaint nor the answers filed by the defendants disclose that the individual defendants are citizens of the United States; (*Hague* v. *C.I.O.*, 307 U. S. 518-523); nor is the asserted liberty a privilege or immunity of citizens of the United States. (*Hague* v. *C. I. O.*, 307 U. S. 518, and other cases cited.) No legislation of the State of Illinois is attacked. While the Supreme Court of Illinois (the court of last resort) was called upon and did construe the Anti-Injunction Act of the State of Illinois, dealing and treating with labor disputes, yet it was not contended in the state courts, nor is it asserted here, that the construction placed upon the act renders this legislation unconstitutional. Defendants concede that they are not attacking the act, and further admit that the construction placed upon the act by the court of last resort of Illinois is binding upon this court. (Petition for Writ of Certiorari p. 23.)

The trade union defendants and their officials did not contend in the state court, nor do they contend here, that they were the duly appointed agents, representatives and bargaining agency of the employee plaintiffs. The com-

plaint here was filed by the employer and all of his sixteen employees; and it was stated and charged that the employees refused to join or recognize the trade unions as their bargaining agency. The strike here and the ultimate purpose for which the strike was carried on was to compel unionization of the shop. Therefore, the ultimate objective did not concern itself with wages, hours or working conditions, or even representation of present employees but merely plant unionization.

The final decree (Rec. p. 37) recites: "The appellants (plaintiffs) have maintained their complaint and the equities of the case are with the appellants." No findings of fact are necessary to sustain the decree Civil Practice Act of Illinois. (Sec. 118, Chap. 110, Ill. Rev. Stat. 1939.) It is presumed that the allegations of fact appearing in the complaint have been proven. The complaint in substance presented the following situation:

(1) The complaint was filed by an employer and all of his sixteen employees (all of whom are women). The employer was engaged in the operation of a beauty shop in the City of Chicago; there was no controversy or dispute between the employer and his employees with reference to hours, wages, terms or conditions of employment or any other controversy of any kind; none of these employees belonged to a trade union, and it is stated that the employees employed by all other beauty shop operators in the City of Chicago were not organized nor belonged to any employees' association or trade union (Rec. pps. 4, 8, 9, 10),

(2) On or about April 30, 1937, the defendant officials and representatives of the local trade union, known as the Hairdressers & Cosmetologists Union, Local 548-D (which it was asserted held a charter from the International Barbers' Union, who in turn were members of the American

Federation of Labor), called upon the plaintiff-employer with the request that he enter into a closed shop agreement with them (Rec. p. 4). The employer stated that he would sign such a contract if the employees joined the trade union. Accordingly, he permitted the union organizers to speak to the employees (Rec. p. 4). When the organizers spoke to the employees, said employees refused to join the trade union (Rec. pps. 4, 8). These employees stated that they had no dispute or contest with the employer and were well satisfied with their wages, hours of labor and working conditions; that they had previously joined a union and that the officials of the trade union "made away" with the membership fees and dues and that the union lasted but a short time; that they felt that a trade union could offer them no greater benefits than they were already receiving from the state women's minimum wage and hour legislation, as well as health and sanitation legislation of both the State of Illinois and the City of Chicago (Rec. p. 9).

(3) In spite of the refusal of the employees to join the trade union, the union organizers insisted that the employer sign a closed shop agreement and compel his employees to join the trade union or upon their refusal, discharge them and hire union members. When the employer refused so to do, a strike was called, picketing commenced, and two and sometimes three pickets walked back and forth in front of the building and entrance to the store premises of the employer, carrying banners upon which the following legend appeared: "This beauty shop is unfair to organized labor; Hairdressers & Cosmetologists Union Local 548-D, American Federation of Labor and Chicago Federation of Labor" (Rec. p. 5). It is charged and asserted in the complaint that the legends were untrue and libelous. This charge is sustained by the decree which enjoins and restrains the carrying of the banners, containing this libelous

legend. It is noted that clause "c" of the injunctional order (Rec. p. 38) only restrains the carrying of banners upon which the aforementioned legend appears (Rec. p. 38).

(4) In addition to the foregoing, the bill of complaint further asserts that automobiles were parked in front of the plaintiff's place of business and were seen passing the premises during the day and evening; one of the customers was accosted by one of the men sitting in the automobile and threatened (Rec. p. 6); one of the members of the picket line also accosted one of the customers and threatened her by telling her that she had better not go into the shop because it was a "scab shop" (Rec. p. 6). A secondary boycott was being maintained by the defendants in concert with other trade unions or trade union members (Rec. p. 11).

This case first reached the Supreme Court of Illinois on appeal by the plaintiffs from an order dismissing their complaint for want of equity and dissolving the preliminary injunction which restrained the defendants in the same manner as ultimately restrained by the final decree. Upon reversal, a final decree was entered based upon the record as hereinabove epitomized, and the Supreme Court of Illinois thereafter dismissed the writ of error proceeding and refused to modify its original order and opinion filed in support thereof. In its opinion, that court stated:

(a) That the ultimate objective and purpose of the defendants were not made lawful by the Anti-Injunction Act of Illinois; that this act as construed by the Supreme Court of Illinois in *Meadowmoor Dairies* v. *Milk Wagon Drivers Union*, 371 Ill. 377, (in which certiorari was denied by this court) was limited to strikes and campaigns between employees and employers or duly authorized representatives and bargaining agents of employees and employers; that the ultimate objective of the trade union and its officials in this case was unlawful under the

substantive law of the State of Illinois; and that therefore being engaged in a strike and campaign which was contrary to the common law of the state, the means used to carry out the ultimate objective, to-wit: picketing, patrolling, carrying of banners, etc., was equally unlawful and was properly enjoined; that such means and as shown by the record constitute a continuing and continuous trespass which courts of equity in Illinois had power to enjoin and restrain;

(b) That even though it may be assumed for the purposes of discussion that the ultimate objective might be lawful, it clearly appeared from the record in this case that violence, intimidation and threats, as well as the carrying of banners containing libelous and untrue legends, characterized all of the means, including the so-called peaceable activities as part and parcel of the trespass and constituted a campaign of force.

(c) And it is further stated in this opinion that courts of equity in Illinois have jurisdiction and power to restrain continuing existing libels as being continuous and continuing trespasses.

Thus there is presented by this record and petition for writ of certiorari the following questions and issues:

Is the declaration of common law by the court of last resort in the State of Illinois, to-wit: that because the ultimate objective of the trade unions is unlawful, and accordingly, that the means used to accomplish this unlawful objective is also unlawful, that therefore the decree properly enjoined picketing, patrolling and the carrying of banners containing libelous statements, a denial of freedom of speech under the due process clause of the Fourteenth Amendment; and is the common law of the State of Illinois which says that even where the objective is law-

ful, that where violence, intimidation, threats and a secondary boycott take place and libelous banners are carried, all of which *per se* are well recognized illegal acts, that the peaceful activities are tarred with the stick of being a part of an entire illegal campaign and may be enjoined, an unconstitutional denial to the defendants of freedom of speech as guaranteed by the due process clause?

SUMMARY OF ARGUMENT.

I.

Under the common law of the State of Illinois as enunciated by its court of last resort, the ultimate purpose sought to be attained by the defendant trade unions by the strike is unlawful. Therefore, the decree enjoining and restraining all picketing and patrolling does not deny to the defendants liberty of freedom of speech under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Gompers v. *Buck Stove & Range Co.*, 221 U. S. 418.
Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S. 229.
Duplex Printing Co. v. *Deering*, 254 U. S. 443.
American Steel Foundries v. *Tri-City Council*, 257 U. S. 184.
Truax v. *Corrigan*, 257 U. S. 312.
Dorchy v. *Kansas*, 272 U. S. 306.
Brinkerhof-Faris Trust & Sav. Bank v. *Hill*, 281 U. S. 673.
West Coast Hotel Co. v. *Parrish*, 300 U. S. 379.
Senn v. *Tile Layers Union*, 301 U. S. 468.
Erie Railroad Co. v. *Tompkins*, 304 U. S. 64.
Thornhill v. *Alabama*, U. S. Case No. 514 (October Term, 1939, decided April 22, 1940).
Carlson v. *California*, U. S. Case No. 667 (October Term, 1939).
Ossey v. *Retail Clerks Union*, 326 Ill. 405.
Fenske Bros. v. *Upholsterers Union*, 358 Ill. 239.
Meadowmoor Dairies v. *Milk Wagon Drivers Union*, 371 Ill. 377.

Swing v. *American Federation of Labor*, 372 Ill. 91.
Section 2a, Chap. 48, Ill. Rev. Stat. 1939 (Anti-Injunction Law of Ill.).
29 USCA, Sec. 20 (Sec. 52) Sec. 20, Clayton Act.
Frankfurter & Green, The Labor Injunction, p. 25.

II.

A court decree which enjoins so-called peaceful picketing where such picketing is a part of a campaign of a trade union in which violence, intimidation, threats and secondary boycotting take place and in which libelous statements are made, does not deprive defendants of freedom of speech as guaranteed by the due process clause of the Fourteenth Amendment.

Gompers v. *Buck Stove & Range Co.*, 221 U. S. 418.
Schenck v. *U. S.*, 249 U. S. 47.
American Steel Foundries v. *Tri-City Council*, 257 U. S. 184.
Near v. *Minnesota*, 283 U. S. 697.
Thornhill v. *Alabama*, U. S. Case No. 514 (October Term, 1939).

III.

The constitutional guarantees under the due process clause of the Fourteenth Amendment, protecting freedom of speech, are not applicable to judgments and decrees of State Courts in proceedings where the rights of private parties are determined under the substantive law of the State.

Palko v. *Connecticut*, 302 U. S. 319.
Graves v. *New York, ex rel O'Keefe*, 306 U. S. 466.
Warren, New Liberty Under the Fourteenth Amendment, 39 Har. Law Rev. 431.

ARGUMENT.

I.

Under the common law of the State of Illinois as enunciated by its court of last resort, the ultimate purpose sought to be attained by the defendant trade unions by the strike is unlawful. Therefore, the decree enjoining and restraining all picketing and patrolling does not deny to the defendants liberty of freedom of speech under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

By legislation in the State of Illinois, peaceful picketing and patrolling by a trade union in which employees of a plant are members and where the strike is carried on for the usual trade union objectives in connection with wages, hours of labor and working conditions, is lawful and cannot be enjoined and restrained by the courts of chancery. (Anti-Injunction Law, Sec. 2a, Chap. 48, Ill. Rev. Stat. 1939; *Fenske Bros.* v. *Upholsterers Union,* 358 Ill. 239); and it has accordingly been stated that peaceable picketing to accomplish lawful objectives is lawful *per se.*

The Anti-Injunction Act of Illinois is a prototype of Section 20 of the Clayton Act, passed by Federal Congress, and the construction of that Act by the Supreme Court of Illinois is consistent with decisions and opinions of this Court construing and apply Section 20 of the Clayton Act. (*Ossey* v. *Retail Clerks Union,* 326 Ill. 405; *Fenske Bros.* v. *Upholsterers Union,* 358 Ill. 239; *Duplex Printing Co.* v. *Deering,* 254 U. S. 443; *American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184). Therefore, we are not con-

fronted in this case with a general statute which prohibits all employee or trade union activities with both lawful and unlawful objectives, nor is there an attack made upon any legislation passed by the legislature of the State of Illinois. This case does not involve the usual contest between an employer and his employees or trade union representatives of the employees, and does not concern itself with the ordinary disputes involved in a contest. This record discloses that the trade union defendants were not the duly authorized bargaining agents of the employees. To the contrary, the trade union was attempting to force itself on the employees to compel them by the strike to designate the trade union as the bargaining agency. The trade union sought to compel the employer to enter into a closed shop agreement under which he would agree to employ none but members of the trade union and to discharge those employees who would not become members. This case involves solely a question as to whether or not a trade union can compel plant unionization against the will and desires of the employees. It is further charged and asserted in the complaint and supported by the decree that none of the employees in the industry itself were members of any trade union—much less of the trade union defendants.

The Supreme Court of Illinois, consistent with its decision and opinion in the case of *Meadowmoor Dairies, Inc.*, v. *Milk Wagon Drivers Union*, 371 Ill. 377, and in the case at bar enunciated and declared that it was the common law of the State of Illinois that the trade unions do not have a lawful right to enforce unionization against the will of both the employees and employer; that therefore the trade union defendants were not conducting a strike for a purpose which was lawful under the common law of the State. Consistent with this declaration of substantive law, it necessarily follows that any means used in an attempt to enforce

the unlawful purpose are tarred with the same stick of illegality, and it was so held and declared by the Supreme Court of Illinois. (*Meadowmoor Dairies, Inc.*, v. *Milk Wagon Drivers Union*, 371 Ill. 377; *Swing* v. *American Federation of Labor*, 372 Ill. 91.)

Defendants here contend that regardless of whether or not the object to be attained by the trade union is lawful or unlawful, that the due process clause of the Fourteenth Amendment protects picketing, patrolling and the carrying of banners and without exception; that, therefore, the courts of the State cannot under any circumstances or conditions enjoin and restrain picketing and patrolling; that this decree therefore is a denial to them of liberty of speech as defined and enunciated by this Court in the freedom of speech cases; and in support of which they cite the case of *Senn* v. *Tile Layers Union*, 301 U. S. 468. They will undoubtedly also seek comfort in the opinions of this Court in the cases of *Thornhill* v. *State of Alabama*, Case No. 514, October Term, 1939, decided April 23, 1940: and *Carlson* v. *State of California*, Case No. 667, October Term, 1939. All of the cases, including the *Carlson* and *Thornhill* cases, deal and treat with legislation general in language and restricting the right to speak freely, regardless of whether or not the ultimate objective to be attained is lawful or unlawful. The *Leaflet* cases, particularly the *Schneider* (Milwaukee) case involve general statutes which attempt to declare ordinary and lawful distribution of literature to be unlawful if carried on at a particular place, to-wit: the public streets; and it is declared by this Court that the reasons assigned by those seeking to uphold the legislation were not sound when an attempt is made to restrict dissemination of information in those places where the people are entitled to obtain knowledge of matters and things within the public domain and of which the public should be concerned and

should have knowledge. In the *Thornhill* and *Carlson* cases, it is quite apparent from a reading of the opinion that this Court was of the opinion (first) that labor questions and problems are of public concern; (second) that the public are vitally interested in these problems and should have the right to be informed of the cause, reasons and position of the parties to the controversy; (third) that the statutes attacked were too general in scope and were aimed at a restraint of peaceful activities for lawful purposes, regardless of the ultimate objective to be attained in a strike. Therefore it was pronounced that the publicising of labor disputes in a peaceful way by pamphlet or word of mouth is secured to all persons against abridgement by the States. We respectfully submit that is not intended by this Court and these opinions to declare that the liberty of freedom of speech in the labor cases can be defined as an "unbridled license to speak." It is recognized in these opinions that the States, within certain limitations, have the right to control by legislation or court decisions a reasonable policy with reference to dealing and treating with specific evils which may exist in labor disputes and that there necessarily are exceptions to this Fourteeenth Amendment guarantee of freedom of speech.

This Court has always recognized that basically the destiny and welfare of the people of the States is a matter of state public policy and wholly within state control, with the only exception, to-wit: such social and economic activities as come within the grant of power to the Federal government under the Federal Constitution. (*Truax* v. *Corrigan*, 257 U. S. 312; dissenting opinions in *Truax* v. *Corrigan*, 257 U. S. 344, 372; *Senn* v. *Tile Layers Union*, 301 U. S. 468; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379.) Accordingly, therefore, the wisdom of the public policy declaring what is or what is not the social and economic welfare

of the people of the State is ordinarily not the subject matter of review in this Court, whether so declared in legislation or enunciated by the State courts as a matter of substantive law. When questions arise as to the constitutionality of court decisions and of the legislation dealing and treating solely with intrastate problems, this Court has said that it is duty bound to accept the construction placed upon legislation by the courts of last resort of the State and by the declaration of the substantive law by the State and cannot, in passing judgment, declare what the law should be; but that review is confined solely to the one question as to whether or no legislation on its face or as construed or the substantive law as declared, defies the Federal Constitutional grants of power. (*Senn* v. *Tile Layers Union,* 301 U. S. 468; *Erie Railroad* v. *Tompkins,* 304 U. S. 64; *Brinkerhoff-Faris Trust & Savings Bank* v. *Hill,* 281 U. S. 673.) This Court has always recognized that the right to carry on business, whether it be called liberty or property has value and is protected by the Constitution of the United States; and accordingly, this Court has also said that interference with this liberty or property right without just cause is unlawful. (*Gompers* v. *Buck Stove & Range Co.,* 221 U. S. 418; *American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184; *Truax* v. *Corrigan,* 257 U. S. 312; *Dorchy* v. *Kansas,* 272 U. S. 306.)

Accordingly, and in dealing and treating with the labor problems and in *Dorchy* v. *Kansas, supra,* it is said: "Neither the common law nor the Fourteenth Amendment confers the absolute right to strike." All text writers have recognized that the doctrine of *damnum absque injuria* in the labor cases is not all-embracing and does not cover each and every trade union activity; and it is said that the strike, the boycott and the picketing can win immunity only if the ultimate objective sought to be attained is lawful. (Frankfurter & Green, The Labor Injunction, p. 25.)

The common law of the State of Illinois is consistent with the declared substantive law found in the opinions of this Court, wherein Section 20 of the Clayton Act has been construed. This Court has declared that picketing and patrolling can be maintained only where the contest involves an immediate relationship of employer and employee; that trade union campaigns carried on by stranger trade unions who were not the duly authorized representatives of the employees to enforce closed shop agreements and general unionization campaigns were unlawful in purpose, and therefore the means used, even though recognized in themselves as lawful, where the purpose is unlawful, can be properly enjoined as part of an entire unlawful campaign. (*Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229; *Duplex Printing Co.* v. *Deering*, 254 U. S. 443; *American Steel Foundries* v. *Tri-City Council*, 257 U. S. 184.) In the case of *American Steel Foundries* v. *Tri-City Council, supra*, this Court sustained the right of the trade union to carry on the strike by peaceful methods, upon the ground that the strike was taking place in a small community and that the entire membership of the trade unions were at one time or another employees of the plant in question; and that in the event the plant was thereafter to be operated with a full compliment of employees, their members would again be employed. Therefore, the strike being carried on for the purpose of dealing and treating with wages, hours of labor, etc., was being maintained for a purpose which was lawful.

We suggest and submit that taking the substantive law as enunciated by the Supreme Court of Illinois and applying such law to the record that the defendants were engaged in an unlawful objective and purpose, and that therefore all of the activities were properly enjoined; that the injunctional decree may be treated as an exception to the general rule announced in the *Thornhill* case, and that this

injunctional decree can be properly sustained under the decisions and opinions of this case in the cases of *Thornhill* v. *State of Alamaba* and *Carlson* v. *State of California, supra.*

It is urged and argued that this court decree creates a previous restraint. This decree attempts to cover only a present situation where the defendants are engaged in an unlawful objective and are guilty of continuing a published libel distinguished from a threatened libel. This decree merely restrains the further publication of what the Court finds to be libel. If there is a change in the picture and the status of the parties or their activities change, this Court decree would not be binding upon them. For instance, if, after the decree was entered the employees voluntarily became members of the trade union and designated the trade union as their bargaining agent, then the court decree could not be enforced; if the employer thereafter refused to enter into a closed shop agreement, the present libelous statements would thereupon become statements of truth. Under such circumstances and conditions, we respectfully submit that the decree would in effect be nullified by the action of the paries; that under such circumstances and conditions new and different substantive rights would come into play and that the decree could not and would not be enforceable. Therefore, we submit that the court decree covers only one particular situation and status and can be effective and applied only so long as the defendants pursue and continue in their present unlawful purpose and activities. We submit that this is not the creation of a previous restraint which applies for all times in the same manner and with like effect as to previous restraint legislation upon which this Court has heretofore been called upon to express judgment.

It is further urged and argued that the ultimate objective of the trade union is lawful, and that this Court

should so declare. This Court is not a court of errors and we reiterate that this Court has never attempted to declare what the common law of a State should be. Therefore, this Court will not now and in this case concern itself with a declaration of what should be the substantive law of the State; the constitutionality and not the wisdom of enunciated law of courts of last resort of a State is the test. (*Brinkerhoff-Faris Trust & Savings Bank* v. *Hill*, 281 U. S. 673; *Senn* v. *Tile Layers Union*, 301 U. S. 468; *Erie Railroad* v. *Tompkins*, 304 U. S. 64.)

We therefore respectfully and humbly urge and submit that the only question presented to this Court is whether or not the substantive law (common law) of the State of Illinois as declared in this case by the Supreme Court of Illinois, results in a denial to the defendants of the liberty of freedom of speech protected by the due process clause of the Fourteenth Amendment; and that this record does not present a substantial Federal question. Certainly, that part of the decree complained of is not violative of the freedom of speech guarantees of the Fourteenth Amendment.

II.

A court decree which enjoins so-called peaceful picketing where such picketing is a part of a campaign of a trade union in which violence, intimidation, threats and secondary boycotting take place and in which libelous statements are made, does not deprive defendants of freedom of speech as guaranteed by the due process clause of the Fourteenth Amendment.

This record presents a factual situation where, in addition to the peaceful picketing and patrolling there were acts of violence and intimidation; there were also libelous legends placed on the banners carried by the picketers; and

further, that a secondary boycott was being fostered, aided and abetted by the defendants. Based upon this record, the Supreme Court of Illinois in its opinion in this case held as a matter of substantive law that the entire conduct was one of trespass, and that the peaceful activities were tarred with the stick of the trespass; that therefore the entire campaign (even assuming that the purpose was lawful) consisted of unlawful means used to obtain an objective; that there could be no separation between the so-called lawful and unlawful activities, and that the entire campaign was an unlawful one. We submit that in passing judgment this Court is bound by such finding of common law; that this conclusion of the court of last resort of Illinois is consistent with substantive law as enunciated by this Court. (*American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184.) This record, therefore, presents a picture of force. This Court has said that "the most stringent construction of free speech would not protect a man * * * from an injunction against uttering words which have all the effect of force." (*Schenck* v. *U. S.,* 249 U. S. 47, at p. 52; *Near* v. *Minnesota,* 283 U. S. 697, at p. 717; *Gompers* v. *Buck Stove & Range Co.,* 221 U. S. 417.)

Thus, in this case, there is presented a picture of a clear and present danger of the destruction of property and the invasion of the right of privacy. (*Schenck* v. *U. S.,* 249 U. S. 47; *Thornhill* v. *State of Alabama,* Case No. 514.)

III.

The constitutional guarantees under the due process clause of the Fourteenth Amendment, protecting freedom of speech, are not applicable to judgments and decrees of State Courts in proceedings where the rights of private parties are determined under the substantive law of the State.

We recognize and concede that this Court has defined the word "state" as it appears in the due process clause of the Fourteenth Amendment, to include therein judgments of the courts of a State and based upon the substantive law of a State. All of the cases in which this principle has heretofore been enunciated by this Court have been cases involving what has been termed to be "procedural due process." This record presents the question as to whether or not the word "state" shall be defined as including the judgments of a court of last resort, based upon a record dealing with the liberty of freedom of speech. Historically, the freedom of speech sought to be protected by the framers of the Constitution was the previous license restrictions that had existed under the English system of government. It was the right to grant or withhold license to speak on purely public questions with which our forefathers were concerned. (See Warren, New Liberty Under Fourteenth Amendment, Harvard Law Review, p. 431.) It was recognized that the thirteen original States protected the right of freedom of speech by their own Constitutions, and that the purpose of the First Amendment to the Constitution, therefore, was to protect the citizens of the States as against encroachment by the new government on the already established right of the citizens of the States to discuss problems and questions arising under the granted powers to the new government. (See Warren, '39 Harvard Law Review, p. 431.)

It is noted that the First Amendment to the Constitution
s first proposed, definitely provided for a restraint on the
tates as well as the Federal Government. As enacted, it
a restraint only upon the legislative branch of the Fed-
ral Government, for it reads, "Congress shall not make
ny law abridging freedom of speech * * *." The succeed-
ng seven Amendments, including the Fifth Amendment
he due process Amendment) by their very language em-
race all branches of the Federal Government. Therefore,
istorically, and as appears from a reading of the first
ght Amendments to the Federal Constitution, we find
hat freedom of speech restriction limits itself to *congres-
ional action,* while the succeeding seven are not limited
o any particular branch of the Federal Government. Up
ntil 1925 this Court consistently announced that the free-
om of speech guarantees of the First Amendment to the
ederal Constitution was not a restraint upon States, but
olely upon the Federal Congress; that, therefore, the Four-
eenth Amendment could not be construed to include there-
the limitations and restrictions of the First Amendment.
he right of freedom of speech was never construed as a
ght or liberty created by the Fifth Amendment. Both of
hese Amendments were presented to the people and passed
t the same time. If it were considered that the Fifth
mendment protected the liberties and rights created by
he First Amendment, it is logical to assume that the First
mendment would not have been presented for adoption.
herefore, it is only logical to say that the Fifth Amend-
ent protected liberties and rights which were not pro-
ected by the First Amendment, and that the First Amend-
ent protected liberties and rights which it was not intended
o be included in the Fifth Amendment. Since 1925 the
irst Amendment has been carried over into the Four-
eenth Amendment by what this Court has said is a "proc-
ss of absorption." (*Palko* v. *State of Connecticut,* 302

U. S. 319.) Can it be said that in absorbing the First Amendment into the Fourteenth Amendment, part of the language as it appears in the first Amendment is to be disregarded? We submit that in the absorptive process the original inherent intent of the limitation and restriction must be recognized and carried over; that, therefore, the First Amendment being a restraint solely on the legislative branch of government, it cannot be rightfully said that the result of the absorption creates a restriction or limitation over all branches of the State Government, including the courts of the State. So to do would be to give the First Amendment an interpretation which was never intended and would result in what this Court has said in *Graves* v. *New York, ex rel O'Keefe,* 306 U. S. 466, is an occasional tendency on the part of this Court to encrust unwarranted interpretations upon the Constitution, and thereafter to consider merely what has been judicially said by the Constitution rather than to be primarily controlled by a fair conception of the Constitution. We respectfully submit that the ultimate touchstone of constitutionality is the Constitution itself and not what might have been said about it.

CONCLUSION.

Defendants seek the enunciation by court decision of a definition of the term "labor dispute" similar to that which is found in the Norris-LaGuardia Act of the Federal Congress. The States having had the opportunity of declaring a policy similar to the Norris-LaGuardia Act, but twelve have passed legislation so defining the term "labor dispute." Fourteen States, however, including Illinois, have enacted laws similar to Section 20 of the Clayton Act; twenty-two of the States deal and treat with the labor ques-

tions and the term "labor dispute" on the basis of the common law of the State. The effect of the requested declaration of substantive law is far reaching. This Court's definition of the term "interstate commerce" as used in the labor cases and under the Wagner Act of Congress has brought (as a practical matter) all of the large employers of labor in the United States under the control of the Federal Government, and to all intents and purposes, has brought cases arising in such employment under the Norris-LaGuardia Act. Thus it must be conceded that by far and large the majority of the persons employed in the United States and the employers as well are subjected to the definition of the term "labor dispute" as it appears in the Norris-LaGuardia Act. This has resulted in taking away from the States practically all control over the labor question and the labor problem. Thus we submit that the public policy of the States in dealing with the labor problems has been limited solely to small business establishments engaged in intrastate business. This means that the State control is limited to the tradesmen distinguished from the manufacturing business. This includes approximately 1,300,000 business men who employ nine or less people.

With the present recognized and conceded membership and financial strength of the five major national trade unions, particularly the defendant American Federation of Labor, it needs no lengthy exposition to demonstrate that the trade union in contests with these tradesmen is by far and large the strongest of the two antagonists. It is common knowledge that these small tradesmen can continue to exist only because they themselves labor in their business; and it must be recognized that the trade union movement does not permit an employer himself to labor. Therefore, it necessarily follows that if the position taken by these defendants were to be sustained by this Court, the immediate result would be, (a) complete unionization of

these small establishments; (b) the employer would be forced to cease laboring in his own business; all with the ultimate recognizable effect of completely putting him out of business. These tradesmen constitute what has been termed the "middle class"; they as current history demonstrates, constitute one of the "bulwarks" of democratic processes. Democratic government has survived only where the middle ground is taken; extreme swings to the right or left have resulted in a total destruction of the democratic system.

We therefore respectfully and humbly submit that the prayer of the petition for writ of certiorari as made by these defendants should not be granted.

Respectfully submitted,

MYER N. ROSENGARD,
SAMUEL A. RINELLA,
Counsel for Respondents.

EUGENE W. SCHOFLER,
Of Counsel.

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